

April 25. 1766.

A N S W E R S

F O R

JANET GIBB, spouse of *Andrew Glass*,
Merchant in *St. Andrew's*, and him for
his interest, Pursuers ;

T O T H E

PETITION of *Alexander Livingston*,
Merchant in *Rotterdam*, Defender.

L AURENCE GIBB, the respondent Janet Gibb's father, did uplift for her, as her administrator-in-law, while she was an infant, 1000 merks, which had been left her as a legacy by a friend, and never gave any account of it till she grew up and was married about the end of the year 1746. Then the respondent and her husband having made a demand upon him for the money, he refused to make payment. But they becoming still more and more urgent in their demands, and threatening a process, he, in order to disappoint the effect of that process, did, of this date, about a month before the process was raised, grant to Andrew Williamson, his son-in-law, being married to another daughter

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daughter of his, the heritable bond for L. 50 Sterling, now under reduction: By which he confesses "to have borrowed" and received from Andrew Williamson, at the term of "Whitsunday last past, notwithstanding the date of the" bond, the sum of L. 50 Sterling," &c. for which he granted an heritable security upon the only fund he had in the world for the payment of his debts, *viz.* a house in St. Andrew's.

It would seem that Robert Douglas, another son-in-law of Laurence Gibb's, was in confederacy with Andrew Williamson to disappoint the respondents of their just debt, and to divide betwixt them the subject out of which it should have been paid. Accordingly, about the same time, this other son-in-law, Douglas, got a long tack of the house for a trifling rent, much under the real value.

Decem. In this month the process was raised before the Commissary
1747. of St. Andrew's, at the instance of the respondents, against Gibb, for payment of the aforesaid legacy of 1000 merks. In this process Gibb having appeared, did, in pursuance of his scheme of disappointing the respondents of a just debt, judicially deny, and offer to depone, that he had never received the money. But the respondents having recovered a receipt under his hand of the money granted to the executors of the testator who left the legacy, the Commissary, in the year 1748, pronounced decree against him.

Upon this decree the respondents did not think proper to do any diligence against their father; more especially, as he was known to be utterly unable to pay, having given away the only fund of credit he had. Neither did the respondent, Andrew Glas, think it prudent or adviseable to pursue a reduction of the heritable bond against Andrew Williamson, who was then a great smuggler in St. Andrew's, with whom he was much connected, and had great dependence upon him for his credit: But after Williamson had died insolvent, and that this heritable bond was adjudged by the creditor the petitioner,

petitioner, the respondents were advised to try a reduction upon the act of parliament 1621, even in the person of the adjudger; and they have prevailed upon the general point of the competency of such reduction, first by the judgment of one Ordinary, viz. Lord Alemoor, then by the judgment of the next Ordinary, Lord Barjarg; and last of all, by the judgment of your Lordships, of this date, upon a hearing in presence, whereby you "repelled the defence, That the adjudgers from
 " a conjunct and confident person are not liable to the chal-
 " lenge arising from the act of parliament 1621; but in
 " respect of the particular circumstances of this case, find
 " that the defender is not obliged to astrict the heritable
 " bond in question; and remit to the Lord Ordinary to proceed accordingly."

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The respondents thought it somewhat hard, that, by this interlocutor, they should be loaded with the proof of the bond not being onerous, instead of the defender being obliged to prove the onerosity of it, according to the common practice: But they had not the least notion that, if they should offer the proof required of them by the interlocutor, the competency of this proof should be disputed. Accordingly, after having made the proper inquiries, they gave in a condescendence, which they thought relevant; and they have the good fortune to have obtained the Lord Ordinary's judgment, allowing it to go to proof.

Against this interlocutor, recited in the 4th page of the petition, the defender reclaims upon two grounds; *first*, That no proof by witnesses in this case can be admitted; and, *2do*, That the facts condescended upon are irrelevant.

As to the *first*, If it be a good defence against allowing the proof, the consequence will be, that, in such a case as this, there can be no proof at all of the gratuitousness of the transaction; for Williamson, the receiver of the bond, is now dead, so that it cannot be proved by his oath; and
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your Lordships have heard for what reasons the suit was delayed till after his death : And, tho' he had been alive, this defender might have objected, that his evidence could not be received against him, any more than that of any other witness, for the same reason that the oath of the cedent cannot be admitted against an onerous assignee. And as to proof by writing, it is impossible to suppose, that, when two people enter into a fraudulent scheme to disappoint the just creditor of his debt, they should furnish proof under their own hand against themselves. And as by the words of the act of parliament 1621, the *onus probandi* is laid upon the pursuer of the reduction in every case, as in this particular case it is by your Lordships interlocutor, the consequence of the petitioner's doctrine is, that in no case, as the act stands worded, and as it was at first interpreted, can there be a proof of the fraud, if witnesses are not to be admitted.

And not only would the act be in this manner repealed by the interpretation which the petitioner puts upon it, but your Lordships interlocutor would be rendered vain and elusory ; of which, as it is very well observed by the Lord Ordinary's interlocutor, it seems to be a necessary consequence that this proof should be allowed ; without which the respondents can have no benefit by it : For when your Lordships found that the reduction was competent against the adjudger, you certainly meant that the pursuer should have some benefit by it ; and the only meaning of the latter part of the interlocutor, finding that the defender, in this particular case, was not obliged to abstract the onerosity of the bond, was, that the *onus probandi* ought to lie upon the pursuers ; and that they must prove, in this case, that the bond was gratuitous, in the same manner as in ordinary cases the defender must prove that it is onerous. But by transferring the proof, your Lordships did not certainly intend to
make

make it heavier upon the pursuers than it would have been upon the defender. Now, it is not pretended but that the defender might have proved the onerosity of the bond by witnesses: Or, if it should be pretended, the contrary is proved by two decisions, both observed by my Lord Stair; the one 5th July 1673, *Home against Smith*; the other 15th December 1671, *Duff against Culloden*; in both which cases the onerosity of the transaction was admitted to be proved by witnesses.

The petitioner argues, and quotes decisions in support of his argument, that writ cannot be taken away by witnesses; and, therefore, as the bond in this case bears a certain sum to have been paid, viz. L. 50 Sterling, as the onerous cause for granting it, it cannot be proved by witnesses that no money was paid.

But this rule will not apply to the case of fraud, which, being of a criminal nature, must necessarily be proved by witnesses: And accordingly your Lordships know that writings, constituting our land-rights, which are the most solemn and of the greatest importance of any we have, are very often annulled by parole-evidence of fraud and circumvention. If, in this case, it had been alledged that Gibb had been imposed upon when he granted the bond in question, there can be no doubt but that a proof by witnesses would have been allowed: And it does not alter the case that the imposition was not upon Gibb, but that it was a fraud of Gibb himself, and of his son-in-law Williamson, by which they intended to disappoint the payment of a just debt.

The petitioner argues, from the words of the statute 1621, bearing, “ That it shall be sufficient probation of the
“ fraud intended against the creditors, if they, or any of
“ them, shall be able to verify by writ, or the oath of the
“ party receiver, of any security from the dyvour or bank-
“ rupt, that the same was made without any true, just,
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“ and necessary cause, or without any true and competent price.”

But it certainly was not the intention of the legislature, by these words, to make an exception to the general rule of law, in a case of fraud, which, by the preamble of the act, is represented as so heinous and destructive: Nor have these words ever been so interpreted, as appears from the decisions above quoted. But the plain meaning of them is, that these two methods of proof shall be sufficient, without saying that no other method of proof shall be admitted; for there is not one word in the act which either says or implies that. And yet, according to the meaning that the petitioner would put upon these words, they would exclude even a circumstantiate proof, partly by writ, and partly by witnesses; so that no other evidence could be admitted, but either a compleat proof by writing, or the oath of the party-receiver of the deed.

And this leads the respondents to an observation which, it is hoped, will satisfy your Lordships that it is not a proof by witnesses only which they demand, but a circumstantial proof, partly by writing, and partly by witnesses: For they think it clear, that they have already a beginning of proof by writing; and that the witnesses they are to examine will do no more than support and confirm the written evidence.

The written evidence they mean, is Williamson's compt-book, which the Lord Ordinary very properly appointed to be produced before he allowed the proof. This compt-book is of the hand-writing of Williamson, and appears to be very regularly kept in the form of a ledger, containing the names of all those with whom he had any dealings, either in goods, or in money; and, among others, there is an account for Laurence Gibb, the granter of the bond, in which there are stated to his debt four small articles of cash lent him, amounting altogether only to L. 8 Sterling; the last of them in March 1747. The particular articles are inserted,

they stand in the compt-book, in the 14th page of the petition, and are all of the hand-writing of Williamfon. Now, your Lordships will observe, that the bond bears that the money was advanced to Gibb by Williamfon at the Whitfunday preceeding; and yet in this book there is no article at all of money advanced to Gibb at that time, altho' the compt-book in other articles comes down to the year 1750, all in the hand-writing of Williamfon. Now, is it credible, That, when Williamfon is setting down regularly the smallest sums lent to Gibb, even to the value of twenty shillings, he would have omitted such a sum as L. 40 or L. 50 lent to him at Whitfunday 1747?

The petitioner, therefore, when he maintains that witnesses in this case are not to be admitted, must maintain, at the same time, that a circumstantial proof of a fraud of this kind, partly by writ, and partly by witnesses, cannot be admitted: A doctrine which he has not hitherto maintained, and, it is believed, will not be advised to maintain.

This compt-book of Williamfon's was found in the hands of Margaret Gibb, a sister of the respondent Janet Gibb, and relict of one Nimmo, who has exhibited it, and deponed; and a copy of her deposition is hereto subjoined, that your Lordships may see how she came by it, and how it comes to be so much torn and lacerated in several places; and there is likewise subjoined a copy of the condescendence given in by the respondents, from which it will appear how well the parole-evidence demanded will tally with Williamfon's book, which perfectly explains the little value which he had got for the bond; being no more than L. 8 Sterling.

As to the *second* part of the argument in the petition, That the condescendence is not relevant, the respondents shall be extremely short, as your Lordships are not in use to canvass nicely the relevancy of proofs before they are taken, provided the mean of proof demanded be competent. They shall therefore only observe, that, with respect to the last
article

article of the condescendence, by which it is offered to be proved, " That when Williamson went to the town-clerk to " take infeftment on the bond, he acknowledged that he " had not given value for the same;" the petitioner is in a mistake when he supposes that this is to be proved by hear-say-evidence, after the death of the town-clerk, to whom it was spoken. For the fact is, that there were, at that time, two town-clerks in St. Andrew's; one of them, who gave the seisin, is dead; but the other, who registrated the seisin, and to whom these words were spoken, is still alive.

As to what is further said in the petition, That the respondents may adduce as witnesses their own near relations: If they should do so, those relations cannot be suspected of partiality in their favour; but on the contrary: For it will be clearly proved, by unexceptionable witnesses, that not only Gibb himself was exceeding angry when this debt was demanded of him, considering the money which he had so long enjoyed as his own, but likewise all his friends; and particularly his other daughters, and their husbands, were much provoked against the respondents for insisting on their demand.

In respect whereof, &c.

J. A. BURNETT.

C O N D E-

CONDESCENDENCE

F O R

JANET GIB and her Husband, Pursuers.

THE pursuer will be able to prove, That when she demanded payment from her father of the 1000 merks legated to her by Dr Melvill, which her father had uplifted, it gave great umbrage to him and all his family, and excited so much resentment against the pursuer, as may well account for the combination amongst them, to disappoint her claim, by granting the gratuitous bond in question.—That her father for many years was a change-house-keeper in St Andrew's, and was afterwards made a surveyor at Ferry-parton-craigs; his salary supported his family; he was not in the way of borrowing money, or contracting debt—That at the time of granting the bond in question, he was possessed of no visible subject, except the house and his furniture, which last was very inconsiderable—That Andrew Williamson, when he obtained his heritable bond, did advance to Bailie Gib only a trifling sum, as will appear from Williamson's own books, so that the bond was almost intirely gratuitous—That Bailie Gib, at signing the bond, said, he had got but very little value, and on that account could hardly be brought to sign it; but was at length prevailed on by the importunity of his wife and other relations—That when Williamson went to the town-clerk to take inestment on the bond, he acknowledged that he had not given value for the same.

These things being proved, will sufficiently show, that this was a gratuitous bond, granted purposely to disappoint the pursuer of her just debt; and must therefore be set aside.

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D E P O-

DEPOSITION of *Margaret Gib* alias *Nimmo*.

25th July 1765.

IN prefence of Lord B A R J A R G Ordinary, Compeared Margaret Gib, relict of William Nimmo carpenter aboard of the Scorpion floop of war, cited on a diligence at the pursuer's instance, aged about thirty-two; who being solemnly sworn, examined, and interrogate as a haver, depones, and exhibits an accompt-book, which she found in the house of Andrew Williamfon deceased, when the deponent went to reside there after the death of his relict: That the deponent has been always told, and believes, that the said accompt-book belonged to the said Andrew Williamfon. Depones, That when she found it as aforesaid, there were many leaves torn out; and that she herself has likewise tore out many leaves both clean and foul; but without any design, as she considered the book as useles: That she delivered the said book some time ago to the pursuer's husband Andrew Glass, in order to send it to Edinburgh, as he said; and that she received the same back from him, much in the same situation as she gave it, so far as she can judge. And depones, she cannot positively say, whether there may, or may not have been any leaves torn out of the book since she delivered it to the pursuer's husband as aforesaid; and she and the Lord Examiner sign the first page of the said book, of this date, as relative hereto. *Causa scientiæ patet*. And this is truth, as she shall answer to God.

(Signed) MARGARET NIMMO.
JA. ERSKINE.

